

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

**Labor Standards Bureau**

**Office of Hearings and Adjudication  
COMPENSATION REVIEW BOARD**



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**CRB (Dir.Dkt.) No. 03-118**

**JAMES JOHNSON,**

**Claimant –Petitioner**

**v.**

**OMNI SHOREHAM HOTEL AND ZURICH AMERICAN INSURANCE COMPANY,**

**Employer/Carrier – Respondent**

Appeal from a Compensation Order of  
Administrative Law Judge Jeffrey P. Russell  
OHA No. 02-240, OWC No. 573065

Matthew Peffer, Esquire, for the Petitioner

James L. DeSisto, Esquire, for the Respondent

Before: E. COOPER BROWN, *Acting Chief Administrative Appeals Judge*, SHARMAN J. MONROE, *Administrative Appeals Judge* and FLOYD LEWIS, *Acting Administrative Appeals Judge*.

FLOYD LEWIS, *Acting Administrative Appeals Judge*, on behalf of the Review Panel:

**DECISION AND ORDER**

**JURISDICTION**

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).<sup>1</sup>

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<sup>1</sup> Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including

## BACKGROUND

This appeal follows the issuance of a Compensation Order on Remand from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on August 28, 2003, the Administrative Law Judge (ALJ) concluded that Claimant-Petitioner (Petitioner) was not disabled from performing his usual employment duties as a result of his work injury, but Employer-Respondent (Respondent) was held responsible for Petitioner's causally related and necessary medical care. Petitioner now seeks review of that Compensation Order.

Petitioner was employed as a laundry runner for Respondent, which required him to deliver linens and related items to closets on the floors of the hotel, for retrieval by other employees. He contends that sometime in August of 2001, he was injured at work and he seeks compensation benefits for his injuries.

In a Compensation Order, dated July 12, 2002, the ALJ determined that Petitioner failed to give timely notice of his alleged work injury to Respondent and Petitioner's claim was denied. Petitioner filed an appeal and on December 3, 2002, the Director reversed and remanded the Compensation Order, finding that the ALJ's conclusion that Petitioner failed to give proper notice of his injury was not supported by substantial evidence and was not in accordance with the law.

The ALJ issued a Compensation Order on Remand on December 31, 2002, in which it was found that Petitioner, through his own testimony, had presented enough evidence to invoke the presumption of compensability that he had suffered an unwitnessed work injury. The ALJ also found that Respondent had presented enough evidence to rebut the presumption, as three credible witnesses stated that Petitioner fabricated the facts and circumstances surrounding how he advised Respondent of the alleged injury.

On this point, the ALJ concluded that Respondent had rebutted the presumption of an accidental injury by presenting evidence that Petitioner was lying under oath concerning relevant matters of his claim. The ALJ saw this as an inference that Petitioner was not only being untruthful about the facts concerning the reporting of his alleged injury, but also the facts of the alleged injury itself. After the presumption was rebutted, the ALJ considered the evidence without reference to the presumption and ultimately concluded that Petitioner's request for relief should be denied. In making this determination, the ALJ found that Petitioner failed to present sufficient credible evidence of a work injury, as his own testimony was found to be not credible and there was no other evidence "not derivative of his own word to establish a work related accident." Meanwhile, Respondent had presented evidence, the testimony of Petitioner's supervisor, that no injury had been reported to him. Thus, the ALJ again denied Petitioner's claim in the Compensation Order on Remand.

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responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

Once more Petitioner appealed to the Director and on March 21, 2003, the Director reversed the denial of the claim on the grounds that the circumstances surrounding Petitioner's reporting of his injury was not evidence to support the conclusion that Petitioner's work injury did not occur and that the testimony from Respondent's witnesses was not comprehensive or specific enough to rebut the presumption. As such, the Director, yet again, remanded this matter for further proceedings, which resulted in the Compensation Order on Remand, issued August 28, 2003, from which the instant appeal was taken.

As grounds for the instant appeal, Petitioner asserts that the ALJ's conclusion that Petitioner was not disabled from performing his usual duties as a result of his work injury, is not supported by substantial evidence and is not in accordance with the law.

#### ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. D.C. Official Code §32-1522(d)(2)(A). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. Dist. of Columbia Dep't. of Employment Servs.* 834 A.2d 882 (D.C. App. 2003). Consistent with this scope of review, the CRB and this Review Panel are constrained to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, Petitioner specifically asserts that the Administrative Law erred in concluding that there were no objective medical tests or findings in the evidence of record that supported his disability. Respondent counters by arguing that Petitioner did not present any evidence of objective tests or procedures which document an injury that caused him to be disabled from his employment.

After the prior Compensation Orders and remands, the remaining matter requiring resolution by the ALJ was the nature and extent of Petitioner's disability, if any. On this issue, Petitioner is not entitled to a presumption concerning the nature and extent of his disability, as he must present substantial credible evidence that he has a disability that entitles him to the benefits that he has requested. *Dunston v. Dist. of Columbia Dep't. of Employment Servs.*, 509 A.2d 109, 111 (D.C. 1986).

The ALJ noted that Petitioner submitted the medical reports and records of various health care providers at the Center for Pain Management and Kaiser Permanente in which he was diagnosed with low back pain and plantar facitis. However, the ALJ found that these medical records did not indicate that Petitioner's medical restrictions were based on any objective tests, as they all were based totally on Petitioner's subjective complaints of his physical inability to work. The

ALJ also emphasized that previously Petitioner was clearly found not credible and the credibility determinations made in the previous Compensation Orders were not disturbed by the Director.

In denying Petitioner's request for relief, the ALJ stated:

I conclude that Claimant has failed to adduce sufficient *credible* evidence of a physical incapacity to perform his pre-injury job; such evidence as has been produced is either from his own testimony at the hearing, which I reject as not being credible, and from his own descriptions of his complaints to his health care providers, which, not being made under oath are even less worthy of belief. The Claimant has therefore failed in his burden of producing 'substantial credible evidence' of a wage loss based upon a physical incapacity from the work injury.

Compensation Order on Remand at 4.

It is well settled that the credibility determinations of the fact-finder are entitled to great deference. *Dell v. Dist. of Columbia Dep't. of Employment Servs.*, 499 A.2d 102, 109 (D.C. 1985); *Nasser v. Moran Limousine Serv.*, Dir. Dkt. No. 91-80, H&AS No. 90-818 (September 9, 1992). Accordingly, we do not find any reason to disturb the ALJ's credibility determination in the instant case, which leaves Petitioner's disability claim solely reliant upon the record evidence introduced.

To support his claim for disability benefits, Petitioner argues that he submitted an x-ray report of his right heel and an MRI report of his back, which he contends establish objective evidence of an injury that precludes him from performing his pre-injury employment duties. The August 30, 2001 x-ray report of the heel revealed a "very tiny calcaneal spur of the right heel" and the MRI report of January 22, 2002 indicates that are mild endplate changes and a small disc protrusion. Petitioner's Exh. Nos. 2,3.

However, even though the x-ray reveals a small spur, there is no medical evidence in the record by Petitioner's treating physicians that the results of this x-ray influenced Petitioner's treatment plan, how it affected his disability status or that it prevented Petitioner from performing his employment duties. Likewise, there is no indication Petitioner's medical evidence as to why the MRI was taken or the significance of the results and Petitioner's medical evidence does not indicate that the MRI prevents Petitioner from working.

After closely reviewing the x-ray and MRI reports, there simply is no explanation or comment on the results of these tests that document an injury that causes Petitioner to be disabled from his employment. This Panel concludes that Petitioner did not submit any objective medical evidence of a disabling condition that prevented him for performing his employment duties, and as such, the ALJ's conclusion to deny Petitioner's request for benefits is supported by substantial evidence and is in accordance with the law. Petitioner has failed to present the necessary

substantial credible evidence required under *Dunston* in order to support his claim of disability entitling him to the level of benefits he seeks.<sup>2</sup>

#### CONCLUSION

The Compensation Order on Remand of August 28, 2003 is supported by substantial evidence in the record and is in accordance with the law

#### ORDER

The Compensation Order on Remand of August 28, 2003 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD

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FLOYD LEWIS  
Administrative Appeals Judge

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July 8, 2005  
DATE

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<sup>2</sup> It is noted that the ALJ also ruled that Respondent is nevertheless liable for reasonable and necessary medical care for Petitioner's work injury. This Panel's decision with regard to the nature and extent of Petitioner's disability does not disturb the ALJ's ruling regarding Respondent's liability for medical care.